BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALBERT C. MEEKS, SR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 241,740
KANSAS OXIDE CORPORATION	)	
Respondent	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carrier	)	

ORDER

Claimant, respondent and its insurance carrier all appeal from the March 1, 2000 Award and the March 3, 2000 Order Nunc Pro Tunc entered by Administrative Law Judge Julie A. N. Sample. The Appeals Board heard oral argument on August 18, 2000.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared on behalf of claimant. Michael J. Haight of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The ALJ awarded claimant a 2.5 percent permanent partial general body disability for his March 6, 1998 accident and injury. Respondent argues the ALJ erred by not denying claimant benefits on the grounds that the injury did not arise out of claimant's employment because claimant was injured as a result of a good natured battery, not horseplay. In addition, even if the claim is compensable, respondent contends claimant has no additional permanent impairment and that future medical should have been denied because claimant suffered an intervening accident. Claimant argues he is entitled to a higher permanent disability award and additional weeks of temporary total disability compensation. The ALJ found claimant was injured by horseplay, and that the claim was

compensable nevertheless because the horseplay had become the practice and custom at the workplace and that it continued with the knowledge of the employer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Award, as corrected by the Order Nunc Pro Tunc, should be affirmed. In her Award, the ALJ sets out findings of fact and conclusions of law in some detail. It is not necessary to repeat those findings and conclusions herein. Therefore, the Board adopts the findings and conclusions set forth in the Award as its own as if specifically set forth herein.

Claimant worked for respondent as a lab technician. On March 6, 1998, while in the locker room changing clothes, the day foreman, Tim Hayes, struck claimant in the low back with what felt like his fist. Claimant fell against a locker and immediately felt pain in his back. Two other supervisory or management level employees were also in the vicinity at the time and had been laughing and engaging in jovial conversation with Mr. Hayes. Claimant testified that he believed Mr. Hayes hit him in the back in a jovial manner and was just fooling around. He believes Mr. Hayes did not intend to injure claimant. Unfortunately, claimant had a preexisting low back condition that had required two prior surgeries at the L4-5 disk level. This incident aggravated claimant's preexisting problems. Respondent has denied the claim, citing rules relating to horseplay. There is no indication in the evidence that the incident resulted from any animosity toward claimant or that claimant had, himself, participated in horseplay leading to the incident.

The record does not indicate any history of horseplay behavior by these two individuals, but it does show a practice of pranks and roughhousing by employees of respondent and that supervisory level workers engaged in and/or were aware of this conduct even before this incident. Linda Loehr, a secretary at the plant, testified that horseplay was contrary to the respondent's written policy, but she did not know whether anyone was ever disciplined for such conduct other than perhaps claimant and Mr. Hayes for this incident. She admitted that pranks were ongoing despite the written policy. The continuation of such conduct, therefore, was condoned.

Injury caused by horseplay does not arise out of employment and is not compensable unless it is shown that the horseplay has become a regular incident of the employment. The ALJ has made a thorough analysis of relevant case law. The Board agrees with that analysis. The Kansas Supreme Court has held that a participant in horseplay may recover compensation for his/her injury where the horseplay has become a regular incident of the employment. Thomas v. Manufacturing Co., 104 Kan. 432, 179 Pac. 372 (1919); Carter v. Alpha Kappa Lambda Fraternity, 197 Kan. 374, 417 P.2d 137 (1966). Kansas decisions do not include any cases where the injury to a non-participating employee was found compensable solely on the grounds that he/she did not participate in the horseplay. Several of the older decisions expressly state injury from horseplay, even injury to a non-participating employee, will not be compensable unless the employer is

aware of a habit of such activity. Stuart v. Kansas City, 102 Kan. 307, 171 Pac. 913 (1918); Neal v. Boeing Airplane Co., 161 Kan. 322, 167 P.2d 643 (1946). That rule has been restated with approval as recently as 1995 in Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995). Although that decision involved an assault in anger, the Court restated the general rule that:

> If an employee is assaulted by a fellow worker, *whether in anger or in play*, an injury so sustained does not arise "out of employment" . . . unless the employer had reason to anticipate that injury would result if the two employees continued to work together. (*Emphasis added.*)

The Kansas Supreme Court has added an exception for an assault arising from a dispute over the conditions or incidents of employment. Brannum v. Spring Lakes Country Club, Inc., 203 Kan. 658, 455 P.2d 546 (1969).

The Board finds this case analogous to the Stuart case where the claimant was attending to his duties when a coworker tossed mortar that injured claimant's eye. The Court looked to determine whether the employer was aware of the horseplay before this incident. The Board has held that in Kansas such knowledge is a prerequisite to compensability. In Rogers v. Big Lakes Development Center, Inc., Docket No. 247,715 (Feb. 2000), the Board said:

> The Board is bound to follow the Kansas appellate court precedent, absent some indication the appellate court is departing from that precedent. State v. Jones, 24 Kan. App. 2d 669, 951 P.2d 1302 (1998). The Kansas Supreme Court may, of course, change the rule. The Kansas Supreme Court appears to have originally followed the majority rule and the majority rule has changed. The Stuart decision quotes the rule found on Page 79 of Corpus Juris as follows:
>
> > An employee is not entitled to compensation for an injury which was the result of sportive acts of coemployees, or horseplay or skylarking, whether it is instigated by the employee, or whether the employee takes no part in it. If an employee is assaulted by a fellow workman, whether in anger or in play, an injury so sustained does not arise "out of the employment," and the employee is not entitled to compensation therefor, unless in a case where the employer knows that the habits of the guilty servant are such that it is unsafe for him to work with other employees.
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> The majority rule as now stated in C.J.S., the successor to Corpus Juris, has changed since the Stuart decision in 1918. C.J.S. states in Section 225:

> An injury to an employee as a result of horseplay, skylarking, or practical joking is ordinarily compensable where the injured employee did not participate in the fun or where such activities were customary in the particular employment
>
> The majority rule is similarly described in Chapter 23 of Larson's Workers' Compensation Law: "Injury to a non-participating victim of horseplay is compensable." The author of the treatise recognizes such claims were once uniformly denied but cites cases from numerous states to support the assertion that such claims are now uniformly granted. The author suggests that the earlier cases "can only be understood by reconstructing the narrow conception of industrial injury which colored all early interpretations of the Act."
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> The Board finds no decision where a Kansas appellate court has denied benefits to the non-participating victim of horseplay as distinguished from assault in anger. The Neal decision indicates recovery has been denied even where the injured person did not participate, but the Court cites no such case and we find none. Finally, there is good reason to adopt a different rule. Horseplay is a common, often accepted, part of employment. Injury from the horseplay can for that reason logically be considered to arise out of the employment. There may be policy reasons to deny benefits to the instigator of the horseplay, but there is no reason to deny benefits to a non-participating victim of horseplay. Assault in anger can be distinguished. It is not an accepted part of employment.
>
> Nevertheless, while one can say the Kansas Supreme Court may, or even predict that it will, change its previous pronouncements on this issue, one cannot say the Kansas Supreme Court has, itself, signaled its intention to change the rule.

The Board finds respondent had the requisite knowledge of horseplay and, therefore, the Award and Order Nunc Pro Tunc granting benefits in this case should be affirmed. For the reasons stated in the Award, the Board agrees with the findings that claimant has a 2.5 percent permanent general body impairment as a result of this accident, no additional weeks of temporary total disability are due and claimant is entitled to future medical treatment only upon application to and approval by the Director. Claimant will have the burden of proving that any request for future medical benefits is directly traceable to the work-related injury.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the March 1, 2000 Award, as corrected by the Order Nunc Pro Tunc dated March 3, 2000,

entered by Administrative Law Judge Julie A. N. Sample should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Overland Park, KS
Michael J. Haight, Overland Park, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director